MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: *The Human Rights Code*, C.C.S.M. c. H175, as amended;

AND IN THE MATTER OF: A Complaint by K.K. against G.S. carrying on business as Hair Passion, alleging a breach of section 14 of *The Human Rights Code*.

BETWEEN:

K.K.,

Complainant,

- and -

G.S., carrying on business as HAIR PASSION,

Respondent.

Appearances: Isha Khan and Sean Boyd, Counsel for the Manitoba Human Rights Commission

G.S., on her own behalf

Adjudicator: M. Lynne Harrison

REASONS FOR DECISION

Introduction

These proceedings arise out of a Complaint by the Complainant K.K. against the Respondent G.S., carrying on business as Hair Passion, filed May 30, 2008.

The Complainant alleges that the Respondent discriminated against her in her employment on the basis of her disability (bipolar depression) by terminating her employment, and that the discrimination was not based upon *bona fide* and reasonable requirements or qualifications for the employment or occupation, contrary to section 14 of *The Human Rights Code* (the "*Code*"). It is further alleged that the Respondent failed to reasonably accommodate the Complainant's special needs which are based on her disability, contrary to section 14 of the *Code*.

On March 10, 2010, I was designated by the Minister of Justice under section 32 of the *Code*, as a Board of Adjudication, to hear and decide this Complaint.

The hearing took place in Winnipeg on November 29 and 30, 2010. Notice of the hearing was provided to the parties and the public in accordance with the *Code*. The Manitoba Human Rights Commission (the "Commission") was represented by counsel, who advised that they were also appearing on behalf of the Complainant. The Complainant was not in attendance at the hearing, except when she herself was testifying. The Respondent appeared on her own behalf. At the outset of the hearing, the Respondent confirmed that she was aware that she was entitled to be represented by counsel and was prepared to proceed without counsel.

In its opening statement, the Commission noted that the Complainant commenced her employment with the Respondent in or around 2000, having disclosed to the Respondent that she had bipolar depression. Counsel stated that there was no dispute that the Respondent accommodated the Complainant's mental disability to a certain extent over the course of her employment. What was in dispute was whether

the Respondent accommodated her disability to the point of undue hardship, whether the Respondent engaged in a reasonable accommodation process with the Complainant to address her special needs, and whether the termination of the Complainant's employment was reasonable and justified in the circumstances.

The Respondent, in her opening remarks, stated that the termination of the Complainant's employment was based solely on the Complainant's increasingly poor performance, and was in no way an act of discrimination against the Complainant because of her illness.

Three witnesses were called by the Commission: Dr. D.H., a psychiatrist; K.K., the Complainant; and J.M., a longtime friend of the Complainant. The Respondent called eight witnesses: E.P., T.M., D.B., and R.F., customers of the Respondent; B.A., an employee of the Respondent; W.T., the Respondent's bookkeeper or accountant; S.S.; and C.W., a friend of the Complainant's family. The Respondent G.S. also testified.

I would note at the outset, that while I have carefully reviewed and considered all of the evidence and argument in this case, it is not my intention to recite all that I have heard and considered, but to refer to its most salient points only, as necessary.

The Facts

The Complainant/Commission's Evidence

The Complainant suffers from bipolar depression. She began working on her illness in or around 1998, at which time her regular physician started treating her for

depression by prescribing antidepressants. When her physician could not keep her regulated, he referred her to a psychiatrist. The psychiatrist prescribed further medication, but did not give her a formal diagnosis. She continued to see her regular physician, and in 2002, he referred her to Dr. D.H. who, she said, formally diagnosed her as having bipolar depression with borderline personality traits.

In describing how bipolar depression presents itself in her, the Complainant stated that she can be in either a depressive state, a stabilized state or a manic state. In a depressive state, she is fairly fatigued, has no zest for life, has suicidal thoughts and is emotionless. In a stabilized state, everything goes well, she is functioning fully and has emotions. In a manic state, she is basically out of control; she does and says things that are inappropriate, spends money, tears things apart to keep busy, and does not sleep for days on end. The Complainant takes medications to treat her symptoms. The medications, she said, produce side effects. They can cause sedation, and definitely memory loss and confusion.

In or around September 2000, the Complainant was hired by the Respondent to work as a hairstylist at Hair Passion. There is no dispute that the Complainant advised the Respondent when she was hired that she suffered from mental health issues. No specific accommodations were discussed at that time with respect to the Complainant's duties and her mental health.

Hair Passion is a small hair salon. The Complainant described the duties of a hairdresser at Hair Passion as, among other things, keeping the shop clean, working with clients, booking appointments, helping other hairdressers out or asking for

help when needed, shampooing, doing perms, colours, highlights, haircuts, blow dries, and basic customer satisfaction.

The Complainant described the atmosphere at Hair Passion as being very informal or unprofessional, where clients and staff were always joking and the language that was used was not always appropriate. There was no dress code policy, although stylists had to wear appropriate clothing and be presentable. There was no sick leave policy, but employees were definitely provided with time off if they were sick. They only had to phone the Respondent to let her know, and she never questioned them or had any problem giving people time off.

The Complainant worked full-time at Hair Passion from 2000 through to the middle of 2004. She did not recall there having been any concerns expressed with respect to her performance during that time. There may have been some comments in passing, but nothing that she could put a finger on. Describing her relationship with the Respondent during those first four years, she said that she would have considered the Respondent her best friend, like a sister.

In August 2004, the Complainant began showing aggressive signs of depression. She was not able to perform or conduct herself properly or look after herself, and her doctor suggested that she take some time off, which she did. She was admitted to the Victoria General Hospital (the “Hospital”), where she was treated and eventually released.

The Complainant was away on sick leave from August through to December 2004. She believed that this was her first long-term absence from work due

to her illness. Up until then, she may have missed a few days here and there, but had not been away frequently or for any real length of time. During her absence, the Respondent hired another hairstylist on a full-time basis, to perform the Complainant's duties until she could return to work.

While the Complainant was absent from work, she and the Respondent kept in touch and were often together. She testified that the Respondent could see her progress. The Complainant returned to work in December 2004, when she told the Respondent, and the Respondent could see, that she was ready to go back. The Respondent did not ask for a note or other documentation from the Complainant's doctor, or for any other information about her illness at that time. When asked whether there were any discussions about accommodating her when she came back to work, the Complainant stated "maybe a few shorter hours". As to whether the Respondent had raised any concerns at that time with respect to her performance, the Complainant said that she was made aware in passing that there had been some complaints, but was not provided with details and was told that she should be focussing on her work and making sure that she was turning out quality work. Asked whether it is common in the hairdressing industry to have complaints from customers, the Complainant responded that it "most definitely" is.

The Complainant continued to work at Hair Passion, with shorter hours, from December 2004 to February 2005.

In late February 2005, the Complainant was again admitted to the Hospital, where she stayed until April 2005. From April to August 2005, she remained

off work, on leave. In August 2005, she was readmitted to hospital for another seven to eight weeks.

The Complainant and the Respondent remained in communication throughout this time. The Complainant testified that the Respondent would come to see her when she was in the Hospital and would phone her mother to see how she was doing, and that she would go over to the Respondent's house and have coffee with her when she had her weekend passes. The Complainant said that the Respondent always knew what stage she was at.

The Complainant returned to work in November or December 2005, on a part-time basis. She said that she would alternate full days or do shorter days, adding that the Respondent always accommodated her that way, all the time.

In response to a question as to whether the Respondent asked for permission to communicate with the Complainant's doctor or for other information about her illness, the Complainant said no.

In terms of any other ways in which the Respondent accommodated the Complainant's illness, the Complainant stated that at the beginning, Dr. D.H. had given her a note as to where she could pick up a seasonal affective disorder lamp which would help her with her depression. The Respondent noticed the note, and shortly thereafter bought the lamp for her. The Complainant said that she would use the lamp at home, and would bring it to work in the "grey months". Sometimes she would come in early in the morning, and after making sure that all the laundry was done for the start of the day, would sit in front of her lamp for a while and have a coffee.

In addition, the Complainant said that the Respondent did her "foils" for her from day one. This process involves singling out parts of a client's hair with foil, putting colour on the hair and folding the foil. The Complainant said that she could not hold the paper steady enough because she was so shaky from her medication, so the Respondent always took care of this for her. She said that in return, she would do as much as she could to help the Respondent, including shampooing, rinsing colours and perms, starting blow dries, making sure clients had coffee and were comfortable, and helping the other girls if they needed help.

The Complainant testified that she was also off work, on short leave, for a period of time in 2006. She could not, however, recall anything else in this regard, except that her next hospitalization was in December 2007.

The Complainant said that the Respondent never told her that the business was being impacted by her performance or her working fewer hours. She said that the Respondent did raise certain concerns relating to her attire, including with respect to certain specific items she had worn, and that she did not wear those items after that. She also said that the Respondent had raised issues about her language, that she "would just sort of say ..., in passing or whatever, ... you need to watch your language, or you need to think before you speak or whatever." The Complainant repeated that it was not a professional shop, it was very casual and laid back, very homey, and everyone felt comfortable there. She had worked in a high end salon, where none of that behaviour or language would have been tolerated, but it was tolerated in this shop, and it was sort of like "monkey see, monkey do" on her part. On cross-examination, the Complainant said that she was in total agreement with the

suggestion that she took part in a lot of the inappropriate behaviour.

On cross-examination, the Complainant agreed that she could not remember the formulas when she was asked to help mix colours, stating that that was why she would write them down. She did not agree that she could not wrap a perm properly without the Respondent having to redo most of it, but did agree that the Respondent had bought larger papers to help her in this regard and that the Respondent may have ended up rewrapping the odd rod here or there, but not most of them. She also agreed that she could not do highlights without her hand shaking, and that the Respondent bought her different papers to accommodate her in this regard, but added that she remembered them being used by other people also.

The Complainant confirmed, on cross-examination, that she always had a job each time she came back from the hospital. She agreed that the Respondent tried to accommodate her by purchasing supplies, adding “you always accommodated me, you always took … care of me. … [E]verything was okay, and then it was like … maybe the last two years, was when problems were arising ….” She subsequently acknowledged that in the last year or two before she was let go, she was allowed ample time for manicures and pedicures and tanning during business hours, and was allowed to leave the shop to pick up supplies from suppliers and to clear her head at Wal-Mart.

The Complainant said that her last day worked was either December 13 or 15, 2007. Her doctor had been working hard at that point to keep her stable, but could not get her medications under control and decided to put her in the Hospital, where he could wean her off her medications, then introduce new ones.

The Complainant said that her illness does not manifest itself suddenly; it usually builds over a period of six or eight weeks before getting to the point where hospitalization is required. She said that in mid-December, she was in a mixed state, and acknowledged that not all of her work was 100%. She was not informed, however, that the Respondent or other staff were doing corrections for her, and was never given the opportunity to see what she could do to fix the problem.

The Complainant was admitted to the Hospital on December 17, 2007, and phoned the Respondent to let her know. She said that she did not have any other communication with the Respondent while she was in the Hospital until January.

On January 13, 2008, the Complainant was home from hospital on her first weekend pass. She phoned the Respondent and, feeling that the conversation was strained, asked her whether she still had a job when she came out of the Hospital. At that point, she said, the Respondent informed her that December 13 was her last day, and that she had to let her go because her shop was in jeopardy. The Respondent told her that she had had some complaints, but did not mention names or what the problem was, only that she could not afford the Complainant anymore or could not keep her on as she was a bad name for her shop. The Complainant said that they did not discuss her health at any point in that conversation because she hung up as soon as the Respondent told her that she was fired. When asked whether the Respondent mentioned something about a Record of Employment ("ROE") during that conversation, she said that she believed so. The Complainant indicated that she had told the Respondent, and that the Respondent was aware at the time of their phone conversation, that she was on a weekend pass.

On cross-examination, the Complainant stated that the Respondent informed her that she was letting her go because she could no longer afford to have her there, that there had been complaints for a couple of months, “like probably October, November, December, where you were really bringing them to my attention, at which point I was sick and I know that my work is not 100%, but I was never given an option to try to fix anybody’s hair.” When pressed as to whether the Respondent had named some of the people who had complained, the Complainant stated that she could only think of one name for highlights, but could not recall any names for haircuts. She also acknowledged that the Respondent had said during their phone conversation that she would be putting shortage of work on the ROE because the Complainant had insufficient clientele and there had been complaints before she left. The Complainant did not agree that the Respondent had spoken to her about helping her find a less stressful job.

The Complainant returned to the Hospital at the end of the weekend. She was discharged in February 2008. It was her evidence that “due to the upset”, her stay “ended up being extended by probably another two weeks”.

The Complainant was originally provided with an ROE dated January 29, 2008 (Exhibit 5), and two weeks’ wages as severance pay. The ROE showed shortage of work as the reason for its issuance, and the expected date of recall as “unknown”.

Sometime after receiving this ROE, the Complainant phoned the Respondent and said that she had been told that she was entitled to additional wages in lieu of notice under the employment standards legislation. The Respondent indicated

that she would check into it, and that the Complainant should call her back the following day. When she phoned back the next day, the Respondent told her that she had checked with Employment Standards, that the Complainant was entitled to an additional amount, and that the cheque was in the mail.

The Complainant subsequently received a second ROE, dated February 8, 2008 (Exhibit 6), which showed shortage of work as the reason for its issuance and "not returning" as the expected date of recall. It also referred to severance pay for 108 hours, in the amount of $1,123.20, as having been paid.

There is no dispute that the Complainant received the total amount of $1,123.20 on account of wages in lieu of notice, representing six weeks' wages, based on 18 hours of work per week at the rate of $10.40 per hour.

On cross-examination, the Complainant confirmed that she had been working 36 hours or four nine-hour shifts (which included lunch and other things) in a two week period. When asked how much money she brought into the shop for cutting hair, she responded that she believed that the business was being funneled at that time to other stylists in the salon, that basically her role was to assist the other stylists, to make sure the customers were comfortable and the shop was clean, and that she did not feel that she was a hairdresser to any extent in the last year.

Starting in May 2008, the Complainant began working as a day care worker at a day care. She remained there until June 2010. In July 2010, she started working as a youth case worker with at-risk youth at Knowles Youth Centre. She was still employed at the Knowles Youth Centre at the time of the hearing.

Dr. D.H. was qualified as an expert on the effects and treatment of mental health conditions and the special needs of persons with mental health conditions, in particular with respect to mood disorders. Dr. D.H. is a physician and psychiatrist, who completed his residency in 1976 and has been practising as a specialist since then. In 1985, after several years in private practice, he moved to the Hospital, where he continued his practice in general psychiatry up to the date of the hearing. For much of his time at the Hospital, he was Head of the Department of Psychiatry, and for several years, Chief of Medical Staff at the Hospital. Dr. D.H. has spent his entire career treating individuals with conditions such as depression and mood disorders, mood and anxiety disorders being the specialty within his practice.

Dr. D.H. stated that treating major mental illness in the hospital-based practice involves, for the most part, a combination of the use of medication and psychotherapy and talk therapy. Individuals are hospitalized at times, but are mostly treated on an out-patient basis. Most individuals suffering with a major mental illness have to make accommodations and adapt to a lifestyle that best enhances their recovery and prevents relapse. Dr. D.H. stated that most individuals who are suffering from illnesses that are within his specialty tend to have problems when they become over-tired or overstressed, or when they get into highly anxious circumstances, and it is therefore important to talk and try to anticipate problems before they arise.

When asked if he has communicated with patients' employers around accommodating patients' conditions, Dr. D.H. responded that you cannot communicate with anyone without the patient's permission. He said that he has communicated with employers on this basis, "not frequently, but routinely".

Dr. D.H. testified that there are several types of bipolar disorders, the most prevalent being bipolar I, II and III. Individuals with bipolar I generally suffer from periods of profound depression and periods of mania, although some only have manic episodes. Individuals with bipolar II suffer from profound depressive episodes, as well as episodes of hypomania. The latter are similar to manic episodes, but the individuals do not lose touch with reality and do not become psychotic, which is what differentiates bipolar II from bipolar I. Individuals with bipolar III only become hypomanic or manic when they are prescribed an antidepressant; the natural course of their illness is just depression, not depression and mania.

Medication plays a large role in the treatment of individuals with bipolar disorder. Generally speaking, mood stabilizing medications are required. With individuals who are highly anxious, medications are prescribed to help reduce anxiety. During depressive episodes, antidepressant medications are prescribed. During hypomanic and manic episodes, medications are prescribed to bring the mood down to normal. When sleep becomes disturbed, medications are often prescribed to help with sleep.

Supportive therapy is also provided, to educate and help individuals understand their illness, how to deal with it, what types of things may precipitate episodes, what they can do to diminish the negative consequences of episodes, and how they can shorten episodes. In addition, individuals are encouraged to become involved with community organizations that can help them live more effectively with their illness.

Dr. D.H. stated that in his experience, most individuals with bipolar disorder are able to function in the workplace when they are not ill or in the throes of an episode. In some cases, however, the illness is so severe that the individuals are completely debilitated and unable to work at all.

The Complainant had been one of Dr. D.H.'s patients for several years. Dr. D.H. stated that she had initially been seen by one of his colleagues in consultation, and that he personally took over her care in 2002.

Dr. D.H. testified that the Complainant suffers from bipolar II. She has suffered from both depressive and hypomanic episodes. When she is depressed, her mood is obviously very low. She has diminished frustration tolerance and is very anxious and irritable. Her energy is compromised, her sleep is disturbed, she loses her usual interests and tends to become more withdrawn and more obsessive compulsive. When her mood is elevated, she is also irritable and can become quite volatile. She gets very speedy and does not sleep. She has limitless energy, talks incessantly and cannot interrupt her speech. She has ideas which are not necessarily grounded in reality, tends to become much more impulsive, spends money inappropriately, has a heightened sexual energy, and her judgment becomes impaired.

Dr. D.H. stated that when he first began treating the Complainant, she lacked the knowledge of her illness, and for the first three or four years, was less than compliant with taking her medications and following treatment advice. Over time, she has learned more about the illness and what is necessary to keep her well, and has become extremely compliant with taking her medications, never misses an appointment,

and does the kinds of things that are advisable to maintain her health. She has become what he said they would describe as "a very excellent patient in terms of trying to stay well."

In terms of the effects of her illness on the Complainant's day-to-day life, Dr. D.H. stated that the effects are profound when she is ill. When she is well, her symptoms are all in control, and she is an extremely capable individual. She is very bright, and as capable as any other individual. When she is ill, that ability completely vanishes.

Dr. D.H. stated that the Complainant knows that there are certain things that she must do when she is well. She must take her medication and cannot compromise its efficacy by excessive drinking of alcohol. She must make sure that she gets enough sleep, avoid relationships that are too emotionally charged or negative and demanding, and be sure not to overdo things by expending too much energy on a day-to-day basis. Most of these things, Dr. D.H. stated, are relatively common sense.

As for some of the special needs that the Complainant might have at her workplace, Dr. D.H. referred to the kinds of things which, he said, are "not really unusual accommodations". Dr. D.H. stated that she would have to avoid very long hours, such as twelve or fourteen hour days, and should not be working late nights. She should have a lesser work week than most people, make sure that she takes breaks, has lunch, tries to relax and take it easy at various times during the day, and does not drink too much coffee.

When asked what effects or side effects medication may have on the

Complainant in terms of her work, Dr. D.H. stated that all medications have side effects, which vary tremendously from individual to individual. In the Complainant's case, she has tolerated medication quite well. Her blood level tends to vary, and they constantly measure it. He indicated that one can become quite tremulous, adding that that would certainly be something they would have watched closely, as you would not want someone who was shaking to a significant extent cutting your hair. Fortunately, he said, this was not a real big problem for her. While some people could get such a profound tremor that they would certainly not be able to maintain the job of a hairdresser, that was not the case for the Complainant.

On cross-examination, Dr. D.H. acknowledged that he had never seen the Complainant in the workplace or cutting hair. When asked whether he thought it was safe for her to handle customers with chemicals and sharp objects with shaking hands "when on her high", he responded that he would be much more concerned about her handling the tools of the trade in terms of her judgment than in terms of her shaking. He stated that in his experience, having observed her just in his office, her tremor, while present, was "not significant when compared to other patients that [he] treated."

With respect to interpersonal relationships, Dr. D.H. stated that the medication would generally not have affected her disposition when the Complainant was well. However, when she was approaching or in an episode, she could have become angered or irritable much more easily, which would definitely affect her interpersonal relationships. Her cognitive skills, particularly her focus and her concentration, would all have declined at that stage.

In response to a question on cross-examination as to whether the Complainant was stable just before her last day of work in mid-December 2007, Dr. D.H. stated that she certainly was not, nor would he have said that she was stable for the entirety of the two years before that. He drew a distinction between someone being entirely well and someone being in the throes of a relapse. He stated that there were certainly times during the course of that two year period when the Complainant “wasn’t at her best”, but “it didn’t necessitate hospitalization necessarily all those times”. Asked whether taking her medicine properly would not stabilize the Complainant, Dr. D.H. stated that it would stabilize her to the extent that she might not manifest the full picture of hypomania or depression, but she could still demonstrate some symptoms. He noted that most people who have a bipolar illness will have some symptoms most of the time, but not be entirely debilitated by those symptoms. The hope in prescribing medication is that the illness will be modulated so that the symptoms will not be there in the extreme. It is very rare, however, that people are completely asymptomatic by virtue of their treatment.

Dr. D.H. acknowledged on cross-examination that he was aware that the Complainant did not take her medications sometimes, and that this was something that they talked about and worked on. He believed that she did better in terms of taking her medication and following her treatment regime in 2006 and 2007 than in 2002, but did not do as well as in 2010. When asked whether he thought that she was taking her medication properly, he replied that he thinks that all of his patients are taking their medication properly until he discovers that they are not.

Dr. D.H. agreed on cross-examination that alcohol and drugs and lots of

coffee should not be mixed with medications such as those taken by the Complainant. Alcohol, he said, is not recommended, but he tells his patients that if they are going to have some, that they should limit the amount to one beer or one glass of wine. As for drugs, they are absolutely contraindicated. He recognizes, however, that his patients don't listen to him in this regard, and expects that they will from time to time indulge in such things. With respect to the Complainant, he said that he was aware that she certainly made her share of mistakes, and when asked whether she drank [alcohol] and coffee excessively and took drugs, notably marijuana, he said that she "fessed up, yes".

In re-direct, Dr. D.H. stated that it is quite common for people with this condition to use alcohol or drugs at some point. He explained that many such individuals drink alcohol when they are depressed, because a drink or two initially elevates their mood. They can also drink to excess during highs, not to elevate their mood, but by virtue of their having completely lost their judgment.

In his direct evidence, Dr. D.H. did not recall having ever spoken with the Respondent about the Complainant, but said that it was possible that he had, as he speaks with a lot of people. Nor did he think that he had ever been asked to provide any note or opinion to the Respondent. He added that he may have provided a note to the extent that the Complainant would be absent from work due to illness, but not any extensive notes explaining her illness or any immediate problem. When it was put to Dr. D.H. on cross-examination that he did speak with the Respondent by telephone in mid-2007, regarding arrangements while the Respondent was to be away on vacation, Dr. D.H. responded that he did not recall such a conversation, but was sure that the Respondent's recall was better than his, and was certain that it would have been with

the Complainant's permission.

Dr. D.H. stated that relapse is common with this illness, and most times is the result of individuals either stopping or changing their medication without proper consultation. It would be very unusual to have a single episode. When asked what was the cause of the Complainant's absences from work, Dr. D.H. stated that she would have been having a relapse of her illness, either a hypomanic episode or a depressive episode, for which she was hospitalized, for weeks or months, and therefore unable to work.

The Complainant was hospitalized in December 2007 and discharged in February 2008. Dr. D.H. saw the Complainant prior to her hospitalization, when her depression was developing, but was out of town and not present while she was hospitalized. He stated that when he later returned and treated her as an out-patient, they discussed her having been terminated and how she felt about it a number of times. When asked whether he was of the view that it had any effect on her mental health during her hospitalization, Dr. D.H. reiterated that his discussions with her were after her hospitalization, and said that in discussing how she felt about it, "it was another stressor at the time, and she was in the throes of a depression, and having lost her job it certainly didn't promote recovery." Dr. D.H. went on to say:

> It likely protracted her hospitalization, because for [the Complainant], it wasn't only losing her job that was significant, that was probably the least significant, what was most significant is she considered her employer even more than her friend.
>
> She described it as if they were like sisters, and she felt let down and hurt by her, and this caused her to feel more distraught, more sad, because she was losing a very significant relationship in her life.

> So, that contributed to how she was feeling at the time, and certainly contributed to a lot of discussion afterwards, and a lot of work trying to help her overcome that loss.

With respect to the matter of accommodation, Dr. D.H. stated on cross-examination that prior to the Complainant's being terminated from her job, she only spoke of how she was treated by the Respondent in the workplace and elsewhere in the highest regard. She never voiced any complaints about her treatment, and until her termination, was extremely happy both with her job and with her relationship with the Respondent, who was like a sister. Dr. D.H. went on to say that "that's one of the things that made it so difficult for her, was that she didn't see this coming, and didn't anticipate it, and the loss of the relationship . . . hurt her more than the loss of the job itself."

J.M. has known the Complainant for more than 20 years. She sees her an average of three to four times a week and talks to her every day. She said that she would have seen or talked with her with the same frequency during the period in question, between 2000 and 2007, except when the Complainant was in hospital or home from the hospital and did not feel like seeing visitors or talking. During those periods of time, they might go a week or so without talking, but J.M. would talk with the Complainant's parents.

With respect to the period of time between 2000 and 2007, J.M. said that the Complainant's moods would change, sometimes very rapidly. She could be tired and lethargic one day and be cleaning like a mad woman the next. There were also periods where she would be stabilized, when most people would not know that there was anything wrong with her. J.M. said that those stable periods could have lasted six

or seven months or longer. She said that in the period of time preceding the Complainant being hospitalized, her mood would usually change and she would go into a depression.

J.M. had visited the Complainant at Hair Passion while she was working there. She recalled one instance early in her employment where the Complainant offered to do her hair. The Complainant mixed the colour for her hair, and the Respondent made some changes to it. The colour was then left on too long, based on the Respondent's instructions, with the result that it burned J.M.'s scalp. J.M. said that after that she would go to the shop when the Complainant was finished work, and the Complainant would do her hair on her own time. Later, when the Complainant's hands were shaking and she could not do the foils, J.M. had to find someone at another shop to do her hair.

J.M. described the environment at Hair Passion as being very loud and boisterous, and informal. She said you could tell that people were friends and comfortable with each other. There was swearing and comments about people's personal lives, their ex-husbands, "the whole kit and caboodle". She said that it would not be uncommon for the Respondent to use the "F" word and to "berate" her ex-husband in front of others, and that this made her very uncomfortable.

On cross-examination, J.M. said that she had visited Hair Passion five or six times in the last two years of the Complainant's employment there. She said that she would come in after work and the Complainant would do her hair, that the Complainant would pay for the shop supplies and she would just give her $10 or $15.

J.M. said that she would not be scheduled into the Complainant’s day, because the Complainant typically worked from 9:00 a.m. to 3:00 p.m. and she could never come during those hours, but if it was a good day, the Complainant would be able to wait and do her hair, and if it was a bad day, as it sometimes was, she would have to cancel.

J.M. testified that the Complainant called her when her employment was terminated. J.M., who is a senior HR manager, told the Complainant that she was entitled to more notice than she had been given. She said that the Complainant was nervous about the situation, so she helped her prepare what she would say when she phoned the Respondent to raise the issue of further notice. She was listening on the phone when the Complainant called her back, and said that she heard the Respondent tell her that “she was entitled to the additional six weeks, and that the cheque was in the mail, and then she said, ‘Have a nice life, bitch,’ and hung up the phone.” J.M. said that the Complainant was in tears after that telephone call.

Asked to describe the Complainant’s mood or demeanour following the termination of her employment, J.M. said that she was struggling. She had been a hairdresser for years, but did not want to go back to hairdressing. She was often depressed, and did not want to do anything.

The Respondent’s Evidence

The Respondent testified that she has personal experience with mental illness, as she has a daughter, a brother and a cousin who suffer from mental illness, including depression and bipolar depression.

The Respondent confirmed, on cross-examination, that she knew that the Complainant suffered from bipolar depression when she hired her in 2000. The Complainant had told her when she started that she had left her previous employment because of a breakdown. The Respondent said that as time went on, she knew about Dr. D.H., or Dr. D. as they referred to him, and knew that the Complainant was formally diagnosed by Dr. D.H. in 2002 as suffering from bipolar depression.

When asked whether she didn't feel the need to ask the Complainant for any information about bipolar depression when she hired her and in the first few years of her employment, the Respondent replied that the Complainant told her everything, that they talked about it. She also reiterated that she understood the disease and had no problem with it, because of her family members who suffered from it and were on medication for it.

The Respondent said that apart from one phone conversation with Dr. D.H. in mid-2007, she did not speak directly with the Complainant's doctor because she and the Complainant were operating on a friendly basis. She believed what the Complainant told her. If she was sick and needed time off, she had it. The Respondent acknowledged that her family members are not affected in the same way by the disease, in that they all carry jobs and have never had problems with their work ethics and jobs. She added, however, that while she had not specifically spoken with a doctor about the Complainant's condition, the Complainant told her everything that she wanted her to know.

The Respondent spoke of various ways in which she had accommodated the Complainant to enable her to do her job. She supplied her with different types of papers to help her with perms and highlights, purchased a special sun lamp for her for $350.00, and had the Complainant go and pick up supplies for her during business hours. She also allowed the Complainant to keep medication at the shop, at the Complainant's request. When questioned on cross-examination about the sun lamp, she said that she purchased it for the Complainant in 2005 or 2006. She agreed that she and the Complainant were pretty good friends at the time, that they were like sisters and were still socializing a lot, and that she gave the lamp to the Complainant as a gift.

The Respondent stated that the Complainant's hours were decreased quite a bit in 2007, at her request. She said that from the beginning of 2006 to the end of 2007, where the Complainant was working one and a half to two days per week, her work had decreased to the point where she had maybe one or two clients each day she was scheduled to work.

On cross-examination, the Respondent stated that the last day the Complainant worked for her was a Saturday, which would have been December 15, 2007. She disagreed that the first time she spoke to the Complainant after that was the phone call of January 13, 2008. Rather, she said that she spoke with the Complainant several times in December, that the Complainant phoned the shop almost every week and asked if she could come in for a pedicure or manicure. However, there was never any time for that, as it was around Christmas and the shop was booked. The Respondent could not say where the Complainant was on January 13 when she called, whether she was in hospital or at her mother's house on a day pass. That phone call

was maybe the sixth or seventh time that the Complainant and she had spoken on the phone since mid-December.

The Respondent agreed that during their phone conversation on January 13, 2008, the Complainant asked if she still had a job, and that she terminated the Complainant's employment, adding that she gave her a reason. The Respondent said that they never got to talk about whether the Complainant was out of the Hospital or whether she would be ready for work because the Complainant just asked whether she had a job to come back to and the conversation ended so fast after that. The Respondent said that she did not know whether the Complainant was out of the Hospital at that time or not, but agreed that she knew that the Complainant was not well enough to be at work and was on leave.

The Respondent confirmed that it was her understanding that the Complainant was paid a total of six weeks' wages based on her regular wages when her employment was terminated and that that was what she was entitled to according to Employment Standards. When asked whether that was all, she said that she went by the law and did not see fit to pay the Complainant more.

E.P. had been a customer of the Respondent for seven or eight years. She testified that conversations with the Complainant had made her feel uncomfortable. She said that the Complainant had a great interest in describing her sexual adventures and complained about the other stylists in the shop, their appearance or laziness, and that this upset her. The Complainant would complain or roll her eyes if she was asked to put in a load of towels, or to sweep the floor, yet everyone in the shop, including the

Respondent, did such chores. E.P. stated that she had voiced her concerns to the Respondent.

On cross-examination, E.P. agreed that she had witnessed other staff joking with each other in the shop, but said that she had not seen them being vulgar or embarrassing. She said that a lot of older clients go to Hair Passion, and she would feel embarrassed. There were boundaries, and in her view, the Complainant crossed those boundaries.

E.P. said that the staff treated the Complainant with kid gloves. They were never certain whether she would become volatile, and were afraid to push her to that point or were wary of her. On cross-examination, she indicated that she was not referring to something physical when she said that the Complainant was volatile; rather, she meant that the Complainant would “verbally erupt”. E.P. could not, however, identify any specific dates when this occurred.

E.P. said that she discussed mental illness with the Complainant, because that was something they shared. E.P.’s mother suffered from mental illness or depression until she passed away, and E.P. herself had suffered from it since her late teens. She would encourage the Complainant to stay on her medications because, she said, you cannot go off them if you have mental illness. She said that she had not spoken with the Complainant for a long time, but that when they were still talking, the Complainant had told her that her boyfriend did not believe in taking medication, so she would go on and off her medications.

E.P. said that after the Complainant left, she would tell her friends that going to Hair Passion was like going to “Steel Magnolias”; it was cosy. She described the atmosphere as being much more relaxed now; people smile more and are happier, and there is more interaction between the stylists.

On cross-examination, E.P. indicated that she would go to the shop at least every six weeks, and would drop by there at least every two weeks just to say hello and play with the Respondent’s dog and her little daughter. When asked whether it would be fair to say that it was a cosy, fun atmosphere between 2000 and 2007, E.P. said that she could not answer that definitively, because there were good days and bad days. She said that if the Complainant was not there, she would be relaxed and happy, but that if the Complainant was there, she might drop in but would not stay. She said that she spent more time visiting at the shop after the Complainant left. She added that she had never stopped being a client, but had considered it.

T.M. testified that she has known the Complainant since 2003. She said that the Complainant did her hair once, and that she was not satisfied with it. The Complainant was really rough washing her hair and combing it out, and although T.M. had asked for a trim, she cut it very short. T.M. said that she had not told either the Complainant or the Respondent that she was not satisfied.

In 2004 or 2005, the Respondent hired T.M.’s daughter C. as an apprentice at Hair Passion. T.M. said that C. was really excited when she started working for the Respondent. She took pride in her appearance, and loved working and learning from the Respondent. This deteriorated very quickly, however, as C. was

unhappy with the Complainant's attitude, and with her not pulling her weight. C. worked hard, but with the preferential treatment the Complainant was receiving, she lost interest and left the job.

On cross-examination, T.M. agreed that the Respondent terminated her daughter's employment at Hair Passion after a heated discussion. She acknowledged that there were performance issues at the very end, but said that when her daughter started, the Complainant was away sick and her daughter flourished. When asked what preferential treatment she saw, T.M. replied that her daughter would work right beside the Respondent's station, where she was busy and her appointments were booked. The Complainant, on the other hand, was not booked at all, and C. and T.M. would see the Complainant getting her nails done, tanning, running errands, and having one appointment a day. Her daughter would ask her why the Complainant could get away with that while she was working really hard, and her work ethic deteriorated. C. was not called as a witness.

T.M. said that she observed the Complainant making comments to other staff to cause friction and chaos in the shop, and talking about people behind their backs. T.M. said that when she was in the basement smoking, she would hear the Complainant always complaining about someone, but that it was so long ago, she could not remember specifics. She said that when the Respondent asked the Complainant to do things, the Complainant would roll her eyes and make comments, such as that the Respondent expected so much of her. The Complainant never said anything positive about the Respondent. The Complainant would also talk about customers, about things

like their ethnicity, how their children dressed “goofy” and how they could not speak English properly.

D.B. was one of the Complainant’s customers. She said that when the Complainant was first hired, her haircuts were fine. However, in the last year when she was still going to the shop, she was not happy at all, as the Complainant would frequently make mistakes, including putting highlights in her hair at one point. D.B. complained to the Complainant. She also complained to the Respondent with respect to the haircuts, but not the highlights. She said that the Complainant was aware of her mistakes, but that the Complainant only indicated to the Respondent that D.B. was not happy with her haircut or dye job, and not that she had made a mistake.

D.B. testified that towards the end of her employment, the more upset the Complainant became while she was cutting hair, the more she would shake, and the more she shook, the more hair would come off. D.B. said that she asked the Complainant on several occasions not to take so much hair off and not to use the thinning shears, but she did so anyway.

D.B. said that her husband was also one of the Complainant’s clients, but that she did such a bad job on his hair that he had to shave it all off and was bald for quite a while. Her two sons were the Complainant’s clients, and the Complainant made mistakes on their hair too, taking off too much hair in places and making their hair “lopsided”. As a result, they decided as a family that they did not want to go back to see her anymore, and did not go back to Hair Passion at all until after the Complainant was gone.

When D.B. was asked whether the Complainant ever talked to her about personal things, such as drinking or drugs or relationships, she responded that she did. She said that the Complainant loved to talk, and would talk from the minute you sat in the chair until the minute you left. She would talk about drinking, having a bottle of wine and getting drunk, and "smoking up". D.B. said that she had witnessed this personally, when she and her husband had gone with the Complainant and another girl to "Cowboys". The Complainant was drinking the whole time in the bar, and she went outside with the Complainant, who then "smoked up".

D.B. testified that she also suffers from bipolar disorder, and that many of her family members suffer from various forms of depression and anxiety disorder. She said that she would have described the Complainant's attitude in the shop as professional when the Complainant first started working there, but not in the last year or so. The Complainant would be up and down and just all over the place, and you never knew what you were going to get when you went to see her, whether she would be depressive and very weepy and tired, or manic and very chatty, talking all the time and super hyper because she had had no sleep.

When asked to describe the atmosphere at Hair Passion since the Complainant is no longer there, D.B. said that that is the reason she came back. It is a family atmosphere, like going and getting your hair cut with family members. It is very welcoming, and that is the reason that she loves going there.

On cross-examination, D.B. stated that she believed that it was in 2006 that they stopped going to Hair Passion. She agreed that she had gone back repeatedly and seen the Complainant as her hairstylist for six years prior to that.

D.B. was asked on cross-examination whether it would be fair to say that the Complainant's moods, especially in the last year that she visited the shop, were up and down due to her mental health condition. Her response was that she could not say that it would be due to her mental health condition, because she was drinking and smoking up as well, and those are also contributing factors. She confirmed that the Complainant had told her about her drinking and smoking up at that time.

R.F. is a customer of Hair Passion, who usually sees the Respondent for his hair services. In July 2006, when the Respondent was not at the shop, the Complainant gave him a haircut and colour, which turned out to be purple. R.F. said that he was certainly not happy, and said so to the Complainant, but that she did not fix it. He phoned the Respondent, and she fixed his hair a couple of days later. R.F. did not see the Complainant for a haircut or any other hair services after that.

R.F. said that the Complainant was very loud on the day she coloured his hair, and agitated or "sort of bouncing off the wall". He felt that she was not very business-like or professional at all. Things were being discussed that were not appropriate in a business, things such as sex and taking medications, things that customers do not really need to hear. R.F. said that the atmosphere at Hair Passion is much more professional now.

B.A. had been employed at Hair Passion since the middle of 2006, and worked with the Complainant for about one and a half years. She described the Complainant's behaviour as being very erratic; it would go up and down depending on her mood and the day.

She said that the Complainant's work was very sketchy, and that there were a lot of complaints from people who did not want to have her do their hair anymore or to be in the shop while they were coming in. Complaints were made at different times, but most of them were after she had gone or was on leave. The customers complained about haircuts that were uneven and about highlights. Problems would be fixed at the shop's expense, mostly by the Respondent and B.A.

B.A. stated that she witnessed most of the Complainant's haircuts while she was at Hair Passion, as the Complainant would usually leave by 2:00 and she was generally working when the Complainant was there. She said that the Complainant would be shaking when she was doing foils, and the foils would be ruined by the time she got them in the hair. The Respondent bought her new products which she could use for this purpose, and which would not crumple. B.A. said that the Complainant was the only one using these products, as she herself found them too flimsy and preferred what she had been trained to use. B.A. said that the special supplies did not take care of the problem, as the Complainant was still very erratic with her work. The Respondent would take over doing the foils because the Complainant could not finish them.

The Complainant had a problem with hair colours and perms too. She was very rough when applying colours, and they would not come out even. With perms,

she could not handle the wrapping because of her shaking, and the Respondent would apply the rollers and rods, then the Complainant would apply the perm. The Complainant would also be given more time to do a perm than other employees, because she needed the extra time.

B.A. stated that with these accommodations, the Complainant was actually treated better than the other employees in a way, because she needed that little extra. When B.A. was asked whether the other hairdressers had to take on more work and clients because of the Complainant's not being able to do her job, she replied that with the Complainant leaving around 2:00 or 2:30, she would not only have to do her own work but also help the Respondent out more and help with answering the phone, doing towels and cleaning the shop, and that this would disrupt her workload as well.

B.A. also commented on the Complainant's appearance, saying that she would wear moccasins and clothing that was inappropriate and frumpy, and that she had seen the Respondent talk to the Complainant about her attire. B.A. said that you would expect to see casual to semi-formal in a salon, but that the Complainant was very, very casual, like she should have been at home, cleaning. Her hair would not be done and would be greasy looking, she would never wear makeup, and portrayed a very frumpy person, like she just did not care how she looked.

W.T. has been Hair Passion's accountant since the 1980's. She does not have formal training in accounting. She took some courses in accounting in the 1980's, but did not finish because her late husband was a chartered accountant. She said that she knew so much from her husband because he taught her. She added that she had

also worked for the Hudson's Bay Company in accounts payable for 15 years. W.T. confirmed that she did the accounting for Hair Passion between 2000 and 2007. She would prepare documents or do the books on a monthly basis, and her husband would do the year-end financial statements.

Referring to a one-page document which she had prepared relating to payroll and Hair Passion's expense and income for the Complainant for the year 2007 (Exhibit 10), W.T. said that Hair Passion paid more money to or on behalf of the Complainant, in terms of salary or benefits (including CPP and EI), than what the Complainant brought in that year. W.T. testified that the difference between what the Complainant brought in and what she received was a negative amount in seven of the twelve months in 2007. Column 8 of Exhibit 10, entitled "Hair Passion Income", and the statement underneath it indicate that overall, Hair Passion lost $82.06 for the year 2007 in relation to the Complainant.

W.T. stated that 2006 was a bad year also. She said that she did not have any figures, but knew that the Complainant was always "behind, because of taking off all the time". W.T. concluded that the Complainant was a liability to the business. She said that her late husband had also told the Respondent that the Complainant was not bringing in enough money.

W.T. said that she had also seen many invoices over the past few years, partly for things for the Complainant personally, including the sun lamp which Hair Passion had bought for her for her illness.

On cross-examination, W.T. stated that she had prepared Exhibit 10 approximately two years prior to the hearing, based on the tapes of what the girls punched in for sales. She indicated that sales would relate to fixing hair, including haircuts, perms, colours, etc., just things that would appear on sales slips. Asked how she accounted for other duties that an employee would do in the shop, such as making appointments, she indicated that that would not figure in the books nor did she think that it should. That would be between the employees, and the accountant would have nothing to do with it.

W.T. confirmed that the Complainant was paid on an hourly basis for the hours that she worked. She said that the Complainant's hourly rate in 2007 was higher than that of the other employees, but could not say what the rates were.

With respect to the invoices she had referred to, W.T. said, on cross-examination, that she could not remember what the invoices were for or the amounts of the invoices as it was a long time ago. She was aware that the sun lamp was a gift for the Complainant, but added that it was a gift for work. She was not aware that the Complainant took the lamp home.

When Commission counsel reviewed Exhibit 10 with her, W.T. indicated that Hair Passion lost not only $82.06 on the Complainant, as set out in column 8 of Exhibit 10, but also the benefits referred to in column 6 of that document, in the amount of $387.59. With respect to column 8 itself, when it was suggested to W.T. that adding the numbers in that column resulted in a positive amount or income of $82.06, as

opposed to a negative amount, W.T. insisted that the total was negative, that to her there was a loss of $82.06.

Based on my review of the numbers in column 8 of Exhibit 10, I agree with Ms Khan that the total is a positive amount of $82.06, representing a net gain as opposed to a net loss in that amount. Further, I do not agree with W.T.'s assertion that the benefits totalling $387.59 are in addition to and not included in arriving at that total. Rather, it is clear, based on a review of the numbers set out in Exhibit 10, that those amounts were included in the column 8 figures representing Hair Passion's income as it relates to the Complainant for 2007.

There is also a note on Exhibit 10 in W.T.'s handwriting referring to severance pay of $1,123.20 based on reduced hours of 32 hours weekly. W.T. confirmed that this was a reference to the pay in lieu of notice required by Employment Standards, equivalent to six weeks of the Complainant's regular wages. She indicated that the numbers used to calculate that pay were based on an hourly wage and 32 hours. When W.T. was asked why she used 32 hours, she said that it was because the Complainant only worked 32 hours or sometimes less. Ms Khan then referred W.T. to column 2 of Exhibit 10, which indicates that the Complainant worked a total of 705 hours in 2007. Asked how the 705 hours were calculated, W.T. stated that it would depend, and that she would only get the hours from the Respondent every payday. No further explanation was given as to why W.T. would then have used 32 hours weekly to calculate pay in lieu of notice, or how the figure of 32 hours weekly could be reconciled with the calculation in column 2 of 705 hours worked in 2007.

C.W. has known the Complainant since 1988. He worked with her mother, and became a friend of the family, such that he was welcomed into their house and they into his. When the Complainant started at hairdressing school, C.W. was one of her “guinea pigs”, and she would cut his hair on a regular basis.

C.W. became a regular client of the Complainant. She would cut his hair at the shop where she was first employed, but neither she nor the shop would take any money for the haircut, as he was considered to be like family. That arrangement carried on, and she would cut his hair whenever C.W. needed a haircut, either at the shop or when she was at his house for supper.

C.W. indicated that he was not always satisfied with the haircuts, but added that hair grows back, that the Complainant was learning in the beginning, and that you cannot complain when you are not paying. He said that the Complainant did give him a hair colour at Hair Passion on one occasion, when he went for his first dye ever, and it was not good. His hair ended up bright red. When the Complainant tried to fix it, it went back to red again. The Respondent eventually took over and fixed it. He did not go back to the Complainant for colours again after that incident. He said that he tried to go back to the Complainant for haircuts whenever she could accommodate him, but that a lot of the time she would not have time or was not in or it just did not work. If he needed a haircut, he would speak to her or phone her first to see if she could do it. He had offered to buy her a pair of clippers and scissors when hers were at work, so that she could cut his hair at her house, but she did not take him up on that.

When asked about the Complainant's behaviour when she was cutting hair, C.W. said that she was very good at what she did at the beginning. At the end, however, she was very loud and boisterous, talking about boys and life in general, and it was not very professional for people who did not know her. He said that there was a decline in her appearance and her personal pride in the last few years, that she would come to work with ripped jeans or her hair not done, and it was not appropriate for a salon.

C.W. still goes to Hair Passion for hair services. Comparing the atmosphere at Hair Passion then and now, he said that it was pretty tense when the Complainant was there, because you could never be sure what she was going to do or how she would be presenting herself. Now, he said, it is a pleasure to go there and have your hair cut. As to whether he had ever heard any swearing or inappropriate talk, he said that he did most of the time when the Complainant was there, but not now.

Positions of the Parties

The Commission

Ms Khan confirmed that the Commission in no way disputes that the Respondent accommodated the Complainant's disability to a certain extent. That accommodation, she said, involved working fewer hours, and may even have involved purchasing a different kind of highlighting foil product that the Complainant could use, double checking some of her colour formulations, or allowing her extra time to do perms. This is not at issue. Rather, the issue is whether the accommodation meets the test of undue hardship. In the Commission's submission, it does not.

It is clear, said Ms Khan, that the onus of proving that reasonable accommodation has been made, or is not possible in the circumstances, lies on the person who alleges it. The Respondent must establish that it would have been impossible to continue to accommodate the Complainant's disability with reduced hours or otherwise; that it was reasonable or justified that she did not at any time attempt to understand, from a health professional such as the Complainant's psychiatrist, the nature of the Complainant's illness and how it affected her functioning at work, relying instead on her own perception of the effects of bipolar depression and the special needs arising therefrom; that it was reasonable and justified that she chose to terminate the Complainant's employment while the Complainant was on medical leave; and that it was reasonable that she did not consider that the Complainant's performance issues immediately before she was hospitalized to stabilize her condition were related to her mental health condition. The Commission's position is that the Respondent has not adduced sufficient evidence to establish, on a balance of probabilities, any of the foregoing.

Ms Khan referred to the purpose of the *Code*, as set out in its preamble, which recognizes "the individual worth and dignity of every member of the human family", that "it is necessary to restrict unreasonable discrimination against individuals, including discrimination based on stereotypes or generalizations . . . and to ensure that reasonable accommodation is made for those with special needs", and that "much discrimination is rooted in ignorance and education is essential to its eradication. . . ."

In the Commission's submission, the evidence of the Respondent herself was very clear when she was asked whether she had attempted to understand the

Complainant's condition by contacting her physician or otherwise obtaining information about its effects. She clearly said that she understands the illness, that she has a daughter and a cousin, at the very least, who suffer from depression, and incidentally, they are able to work full-time. This evidence captures what is perhaps the essence of this Complaint, and the type of attitude which the *Code* seeks to eradicate.

Ms Khan also spoke of "the prevailing theme" in the evidence adduced by the Respondent of "preferential treatment observed by customers and co-workers". Even if that evidence is accepted, she said, it appears clear that such "preferential treatment" relates only to the fact that the Complainant was being accommodated to some extent, not because she was given "preferential treatment", but because she had an arrangement to work reduced hours based on needs related to her disability and as advised by her physician. There was no evidence to suggest that her pay was not commensurate with the hours she worked.

It was submitted that the Commission's Policy #L-9 on "Reasonable Accommodation" might provide some guidance in determining whether there was reasonable accommodation of the Complainant's disability. That Policy requires that both the procedure employed by a respondent to assess the issue of accommodation and the substance of the accommodation itself be considered and is based on the decision of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 ("*Meiorin*").

With respect to procedure, factors to be considered include whether the

complainant was provided the opportunity to participate in the process of assessing the issue of accommodation and whether all parties who are obliged to assist in the search for possible accommodation, including the complainant, have fulfilled their roles. In this case, there was little or no communication with the Complainant's doctor. The Respondent relied on the Complainant, someone suffering from mental illness, to communicate her needs. There was no evidence that the Respondent tried to seek knowledge about the Complainant's illness and its effects in order to determine new ways of accommodating her. Rather, the Commission suggested, the Respondent's attitude was that her subjective knowledge of some form of depression as it presented itself in some of her relatives (of which there was no medical evidence) was sufficient. This should be considered in light of Dr. D.H.'s evidence that there are various kinds of bipolar mood disorders, on a scale of at least one to three.

With respect to the substance of the accommodation offered, the Commission conceded that the reasonable consideration for time away from the shop due to hospitalization, or being home due to illness, was excellent. It was submitted, however, that the Respondent has not proven that there were no reasonable alternatives, or that the termination of the Complainant's employment was the only available option at that time. There was no evidence that the Respondent considered the link between the Complainant's performance and her illness, or whether it would be impossible to continue to accommodate her in the way she had been accommodated since at least 2004. There was no factual evidence of hardship to the business beyond Exhibit 10, which was prepared by W.T. after the Complaint was filed and not as part of the ordinary reporting of the business and, it was submitted, could not be relied on as

proof of financial hardship. It was not disputed that the Complainant worked on average 18 hours per week. While the Respondent's evidence was that the Complainant only saw one or two clients a day for hair services, the evidence of various witnesses was that many other duties were still part of her job, including laundry, cleaning, prepping clients, blow dries, and picking up items for the business. To rely solely on money brought in through hair services would not seem to provide an accurate analysis of the financial picture.

It was submitted that the evidence establishes that the Respondent was a good and caring friend to the Complainant in many instances, but that that is not what this case is about. This case is about the Respondent's obligations as an employer to her employee, as it is that relationship which the *Code* seeks to protect. The Respondent may have bought her a gift of a sun lamp and, as an employer, may have ensured that the Complainant had a job to return to after she was hospitalized on different occasions during her employment, but ultimately the accommodation broke down. There was not a sufficient process, and in the end there was no process.

The Respondent did not discharge her obligations as an employer to address the Complainant's special needs in 2008. Her decision to terminate the Complainant's employment was not only premature, it was untimely. There is no question that the Complainant's disability was a factor in that decision. While the Respondent portrays the evidence in the months preceding the Complainant's hospitalization as simply poor performance, the Commission says that even if those events were proven (which, it submits, they were not), they show that the Complainant was in a downward spiral related to her illness, for which she ultimately required

hospitalization. It was suggested that with communication and redirection to other tasks, these "botched jobs" might reasonably have been avoided.

Dr. D.H. testified that most of his patients with bipolar disorders are able to function in the workplace when not ill. His evidence was also that in the past few years, dating back perhaps as far as 2005, the Complainant had been an excellent patient with respect to trying to stay well and best manage her illness. The Commission submitted that the Respondent's evidence was selective and anecdotal at best, and should be weighed against that of Dr. D.H., as corroborated by J.M., that the Complainant's mood could be stabilized for long periods of time.

Ms Khan submitted that customer complaints are only that. In some cases, the Complainant was not even made aware of them at the time, and there was evidence that they are common in the industry. It was submitted that the job is more than just providing haircuts and colours. It was also suggested that for every witness who was not happy with a haircut, plenty of others could speak of being happy with theirs.

In the Commission's submission, the evidence was colourful, and perhaps painted a picture of a small hair salon frequented by friends and neighbours. While witnesses spoke of being uncomfortable when the Complainant was present, they also spoke of sharing intimate details of their own illnesses or those of family members, and of socializing with the Complainant. Evidence with respect to the Complainant's performance in terms of the use of vulgar language and inappropriate attire only seems

to have arisen after the Complaint was filed, and ought to be considered in light of the timing of such allegations.

Ms Khan referred to the *Meiorin* decision, as speaking to the test of undue hardship. The use of the term "undue" implies that some hardship is acceptable. To be justified, therefore, a standard must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual up to the point of undue hardship. Undue hardship cannot be established by relying on impressionistic or anecdotal evidence or after-the-fact justifications. Anticipated hardships caused by proposed accommodations should not be sustained if based only on speculative or unsubstantiated concern that there might be certain adverse consequences if the complainant is accommodated.

The Commission submitted that the Respondent had not demonstrated that it would have caused her undue hardship to continue to accommodate the Complainant in the way she had been accommodated to that point or otherwise. The Respondent could not demonstrate that she could no longer accommodate her without expressly even considering what such accommodation might look like or seeking any information as to what specific accommodation would be appropriate for the Complainant. There was no evidence as to why she could not have hired another stylist to work, even on a part-time basis, to account for the hours that the Complainant was not doing hair. In the Commission's submission, it was not really impossible to continue to accommodate the Complainant's disability, even until she returned to work and the Respondent sought some further information about her special needs.

The Respondent

The Respondent's position was that the Complainant was relieved from her services solely on the basis of her poor performance, not her illness.

The Respondent submitted that she had done her best to reasonably accommodate the Complainant's illness. She hired the Complainant fully knowing that she suffered from mental illness, and employed her for seven years. She provided the Complainant with ample time off on many occasions, decreased the Complainant's work hours, sent the Complainant to pick up product so that she could clear her head, allowed her free in-house tanning, manicures and pedicures during work hours, and bought her equipment to help her improve her mood.

However, she said, the Complainant's "diminishing performance was enough to negatively affect fiscal inflow, client trust and comfort, and the credibility of [her] establishment." Complaints from numerous clients, coupled with lost wages from complementary fixes, were common occurrences due to the Complainant's work. The Respondent had to dedicate time and money from her own pocket to deal with these problems.

The Respondent submitted that she knows about depression, that her brother, cousin and daughter suffer from that illness and are on medication. She is very sympathetic to people with the illness. Her experience is that they are reliable workers, who do not let illness affect their behaviour or work ethic. As a result, she had no problem hiring the Complainant, and no desire to discriminate against the Complainant due to her mental problems.

In January 2008, she was under the impression that the Complainant was already at home, and believed that she had a legitimate reason to terminate her employment on the grounds of undue hardship, to improve the company's sustainability. If the Complainant had resumed practice with the Respondent, the business operations would have continued to decline substantially. She simply could not jeopardize her business any longer.

Analysis and Decision

Discrimination in employment is prohibited under subsection 14(1) of the *Code*, which reads as follows:

> **14(1)** No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

The phrase "any aspect of an employment or occupation", as it appears in subsection 14(1), is defined in subsection 14(2), in part, as follows:

> **14(2)** In subsection (1), "**any aspect of an employment or occupation**" includes
>
> (a) the opportunity to participate, or continue to participate, in the employment or occupation;
>
> (b) the customs, practices and conditions of the employment or occupation;
>
> . . .
>
> (f) any other benefit, term or condition of the employment or occupation.

"Discrimination" is defined in subsection 9(1) of the *Code*, in part, as follows:

> **9(1)** In this Code, "**discrimination**" means
>
> . . .

> (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
>
> . . .
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

One of the applicable characteristics for the purposes of subsection 9(1), as identified in clause 9(2)(l) of the *Code*, is "physical or mental disability or related characteristics or circumstances. . . ."

The onus of proof in a proceeding under the *Code* is set out in section 52 of the *Code*, which reads as follows:

> **52** In any proceeding under this Code, the onus of proving that a provision of this Code has been contravened lies on the person alleging the contravention, but the onus of proving
>
> (a) the existence of a bona fide and reasonable cause for discrimination; or
>
> (b) that a requirement or qualification for an employment or occupation is bona fide and reasonable; or
>
> (c) that reasonable accommodation has been made or is not possible in the circumstances; or
>
> (d) the applicability of any other exception to the prohibitions enacted by this Code;
>
> lies on the person alleging that matter.

The onus is on the Complainant, therefore, to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, would be complete and sufficient to justify a decision in favour of the Complainant absent an answer from the Respondent. (*Ontario (Human Rights Commission)* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at para. 28)

Assuming that a *prima facie* case of discrimination is established, the Respondent will then have the onus to prove that one of the exceptions to the prohibitions under the *Code* applies, such as that reasonable accommodation was made or was not possible in the circumstances.

To establish a *prima facie* case of discrimination, the Complainant must prove, on a balance of probabilities, that she had a mental disability at the relevant time, that her employment was adversely affected in some way, and that her disability was one of the factors which motivated the decision or action that adversely affected her employment. Her disability need not be the sole or even the primary reason that her employment was adversely affected; it is sufficient if her disability was one of the factors that influenced the decision or action.

There is no dispute that the Complainant suffered from a mental disability at all times relevant to this Complaint. Dr. D.H., who had been treating her since 2002, testified that the Complainant suffers from bipolar II, an illness characterized by profound depressive episodes and hypomania. The Respondent knew and accepted that the Complainant suffered from a mental illness when she hired her in 2000. From time to time during the course of her employment, the Complainant had to be hospitalized or otherwise absent from work due to a relapse of her illness, and by the middle of January 2008, she had been in hospital for almost a month due to her illness.

There is also no question that the Complainant's employment was adversely affected, in particular, when it was terminated by the Respondent in mid-January 2008.

There is, however, a dispute as to whether the Complainant's disability was a factor which motivated the decision or action that adversely affected her employment. In particular, the Respondent has argued that the Complainant's employment was not terminated because of her disability. Rather, it was submitted, her employment was terminated solely because of her poor performance. I cannot agree.

In my view, the Complainant's performance cannot be separated from her illness. On the totality of the evidence in this case, I am persuaded that the Complainant's illness negatively affected her in the performance of her duties at Hair Passion, particularly in the last year or so of her employment, and was at least an indirect or motivating factor in the decision to terminate her employment.

In this regard, it is clear that for some period of time before her dismissal, it was difficult or impossible for the Complainant to perform some of the tasks which were required in providing certain services, notably highlights, colours or perms, because her hands were shaking. The evidence was that this shaking resulted from the medication she was taking for her illness. While there was some disagreement as to how long or to what extent the Complainant required and received assistance in performing these tasks, either by being provided with special supplies for her use or by relying on others to do some of the work for her, it was not disputed that she needed and received help to do them.

In addition, I am convinced that in at least the last couple of years of her employment, the Complainant became increasingly unable to properly perform other tasks which would normally form part of the duties of a hairstylist at Hair Passion. The

Respondent referred to the Complainant's "diminishing performance", to complaints from customers, lost wages from complementary fixes, and having to dedicate her own time and money to deal with these problems. There was evidence from several witnesses that they or their family members were very unhappy with uneven, "lopsided" or bad haircuts or other hair services which they received from the Complainant.

There was also evidence, which I accept, that in the last year or two of her employment in particular, the Complainant used language in the shop which was inappropriate and embarrassing to at least some of the customers. The Complainant said that such language was tolerated in the shop, and it was like "monkey see, monkey do" on her part. To some extent, that may be true, but I am persuaded that the Complainant's use of language at times crossed the line in terms of what was acceptable. I also accept that the Respondent had to speak to the Complainant during this period of time with respect to not only her language, but also her attitude and her attire, all of which had been deteriorating.

Further, I am satisfied that many, if not all, of the above problems resulted at least in part from a relapse of the Complainant's illness. The evidence established that the Complainant's episodes do not manifest themselves suddenly, but build over a period of time, and that her skills and abilities, including her focus, concentration, tolerance and self-control, decline or vanish when she is approaching or in an episode. In my view, that is what happened in this instance. While it is unclear to what extent the Complainant was suffering from a relapse at various times during the last year or two of her employment, it is clear from Dr. D.H.'s evidence that the Complainant was not stable just before her last day of work and hospitalization in mid-December 2007, and

that there were certainly times in that two year period where she was not stable or "at her best". In the end, she was hospitalized because she was suffering from a depressive episode, and efforts to bring her symptoms under control, short of hospitalization, had not been successful.

Before going further, I would note that in support of her position on this point, the Respondent stated that she had no desire to discriminate against the Complainant due to her mental problems. I have no difficulty accepting this statement. I see no evidence of an intention on the part of the Respondent to discriminate against the Complainant. A desire or intent to discriminate is not, however, a necessary element of a claim of discrimination. In other words, the lack of an intent to discriminate is not an answer to the Complaint; it does not negate the claim of discrimination.

In summary, I am satisfied, on the balance of probabilities, that the performance issues which the Respondent relied on as justification for the termination of the Complainant's employment were inextricably linked to the Complainant's disability, and that the Complainant's disability was thus a motivating factor in the decision to dismiss her from her employment.

As a result, I find that the Complainant has discharged the onus of establishing a *prima facie* case of discrimination.

The onus thus shifts to the Respondent to prove, on the balance of probabilities, that reasonable accommodation was made or was not possible in the circumstances.

At various times during the course of the submissions, the applicable standard was described in terms of whether it was impossible for the Respondent to accommodate or to continue to accommodate the Complainant's disability. The obligation as set out in clause 9(1)(d) of the *Code* is to make "reasonable accommodation" for the special needs of any individual or group. The test, therefore, is not whether it was impossible for the Respondent to accommodate the Complainant, but whether it was impossible for the Respondent to "reasonably" accommodate the Complainant.

The *Code* does not define or specify what is meant by the phrase "reasonable accommodation". In *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970 ("*Renaud*"), at p. 984, the Supreme Court of Canada equated "reasonable" with "short of undue hardship" as "alternate ways of expressing the same concept." In other words, an employer must establish that it cannot accommodate or further accommodate an employee without experiencing undue hardship. In *Renaud*, the Court observed that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test." (*Ibid.*, quoted in *Meiorin*, at para. 62). To satisfy its obligation under the *Code*, an employer must therefore accommodate an employee as much as possible, short of undue hardship. (*Meiorin*, at paras. 62 and 64)

What constitutes reasonable measures or reasonable accommodation will vary, depending on the particular facts and circumstances of each case. Factors which may be relevant in assessing reasonableness or "undue hardship" include the financial cost of accommodation, safety concerns, and substantial interference with the rights of

other employees. (*Meiorin*, paras. 63 and 78-80)

As noted by the Commission, the Supreme Court of Canada made it clear in *Meiorin* that the duty to accommodate has both procedural and substantive components. (para. 66) The Court added that notwithstanding the overlap between the inquiries relating to these two components, it may often be useful as a practical matter to consider them separately.

The Commission referred to its Policy #L-9 entitled "Reasonable Accommodation: Disability". That Policy provides a useful list of procedural and substantive factors which may be considered in determining whether reasonable accommodation has occurred in the circumstances of each case. Factors for consideration with respect to the procedural aspect are described therein as follows:

> 1. The **procedure** employed by the respondent to assess the issue of accommodation. In particular, the Commission will examine what steps were taken by the respondent to search for and consider options for accommodation. Some of the questions that the Commission will consider are as follows:
>   a. have alternative approaches to accommodation that do not have a discriminatory effect been investigated?
>   b. if alternative approaches were investigated and found capable of being implemented without undue hardship why were they not implemented?
>   c. was the Complainant provided the opportunity to participate in the process of assessing the issue of accommodation?
>   d. have all parties who are obliged to assist in the search for possible accommodation, including the complainant, fulfilled their roles?

With respect to "[t]he **substance** of the accommodation offered to an individual", the Policy lists as examples of reasonable accommodation of disability:

> . . .
> b. making employment and services available to persons with disabilities by altering existing practices or procedures, or adopting new practices or procedures;
> . . .
> d. re-assigning an employee who is unable to perform the essential duties of his or her job to an alternate work assignment suited to that employee's qualifications and abilities;
> e. allowing for flexible work and leave schedules;
> f. reasonable consideration of physician-directed absences for clinical depression or related conditions;
> g. consideration of how clinical depression or related conditions might have affected the employee's performance before the employer became advised of the condition(s).

In its submission, the Commission raised issues with respect to the Respondent's treatment of the Complainant both during the course of her employment and at the time her employment was terminated. The Commission conceded that the Respondent accommodated the Complainant during the course of her employment, but qualified that concession by adding that the Complainant was accommodated "to a certain extent" and that there was not a sufficient process. The Commission went on to argue that in the end there was no process, and that the Respondent failed to discharge her obligations as an employer when she terminated the Complainant's employment in 2008.

With respect to the issue of accommodation during the course of the Complainant's employment, in my view, it is clear from a procedural standpoint that the Respondent considered a number of options for accommodating the Complainant. This is evident from the fact that various forms of accommodation were made available to the Complainant including, among other things, purchasing special supplies and equipment to assist her, accommodating her numerous and lengthy absences, reducing her hours

of work, allowing her to take additional breaks, and assigning to her or allowing her to perform other tasks.

The Complainant had the opportunity to participate in the accommodation process during this period. The evidence indicates that the Complainant and the Respondent were very close, that they talked about her illness, and that accommodations were made at the Complainant's request.

The Commission was critical of the Respondent relying on the Complainant, "someone suffering from mental illness, to communicate her needs". Yet, the Commission in its Policy indicates that the Complainant ought to have the opportunity to participate in the process of assessing the issue of accommodation. This is not a situation where the Complainant was unable or reluctant to communicate with her employer. Rather, the evidence generally indicates that the Complainant could and did communicate information regarding her illness and her special needs to the Respondent, including advice from her physician. The Respondent testified that the Complainant's hours were decreased quite a bit in 2007, at the latter's request. The Commission also referred in its submission to the Complainant having had an arrangement to work reduced hours based on needs related to her disability and as advised by her physician. Thus, to the extent that the Commission would appear to suggest that it was inappropriate for the Respondent to have relied on the Complainant in this case, when considering, implementing and assessing various accommodations, I disagree.

The Commission was also critical of the Respondent having had little or

no communication with the Complainant's doctor. Dr. D.H. clearly stated, however, that he could not and would not have communicated with the Respondent directly without the Complainant's consent. Moreover, the evidence indicates that Dr. D.H.'s advice and recommendations were communicated to the Respondent by the Complainant and followed. Thus, for example, the Respondent arranged for the Complainant to work reduced hours as advised by her doctor. She also purchased a special sun lamp which Dr. D.H. had recommended for the Complainant, and regardless of whether that lamp was provided as a gift to a friend or not, the fact remains that it was provided, at the Respondent's expense, and that the Complainant could and did use it at the shop.

The Respondent did say that she had one telephone conversation with Dr. D.H. Dr. D.H. did not dispute that that conversation took place, adding that it would have been with the Complainant's permission. Apart from that, there was no evidence to indicate that either the Complainant or Dr. D.H. felt that there was any need for Dr. D.H. to be in communication with the Respondent, either orally or in writing. In fact, Dr. D.H. testified that prior to being dismissed, the Complainant was extremely happy with her job and always spoke about how she was treated by the Respondent in the workplace and elsewhere in the highest regard. In her evidence, the Complainant acknowledged that the Respondent always accommodated and took care of her. While she alluded to problems arising maybe in the last two years, she also acknowledged that various additional accommodations were made at that time, and there was no real suggestion of anything further that the Respondent could or should have done to accommodate the Complainant's needs at that or any other time prior to her dismissal.

The Commission also argued that instead of trying to obtain information

about the Complainant's particular illness and its effects on her, the Respondent relied on her own understanding of some form of depression and its effects. While the Respondent said that she understood bipolar depression and had personal experience with family members who suffer from mental illness, I do not find that her treatment of the Complainant was simply based on her own experience, or on generalizations and stereotyping as the Commission suggests.

I am satisfied that the Respondent made significant efforts during the course of the Complainant's employment to understand and accommodate the Complainant's particular circumstances and needs. Although she spoke of her family members being able to work full-time, the evidence does not indicate that the Respondent required or automatically expected this of the Complainant. On the contrary, the Commission itself conceded that the Respondent's consideration for time off on account of hospitalization or illness was excellent, and it is clear that the Respondent accepted and accommodated the Complainant's absences and her need to work reduced hours over a period of several years, at least up until the middle of January, 2008.

In summary, on the facts and circumstances of this case, I am satisfied that the Respondent met the procedural requirements of the duty to accommodate the Complainant during the course of her employment.

I am also convinced that the Respondent satisfied the substantive component of the duty to accommodate the Complainant, accommodating her needs on an ongoing basis throughout her employment.

As previously stated, several forms of accommodation were implemented by the Respondent over the years, including time off whenever requested or required for hospitalization or time at home due to illness, reduced hours, additional breaks, purchase of special equipment and supplies, assistance with tasks that the Complainant was unable to do or had difficulty doing, and assignment of other tasks that she could perform.

Dr. D.H. testified that the kinds of needs the Complainant might have at her workplace were "not really unusual accommodations". Accommodations which Dr. D.H. referred to in his testimony were implemented by the Respondent, and it is significant, in my view, that there was no evidence of any further accommodations which he had recommended or felt ought to have been considered or implemented by the Respondent during the course of the Complainant's employment, but were not.

Based on the foregoing, I am satisfied that the Respondent fulfilled her obligation to reasonably accommodate the needs of the Complainant during the course of her employment.

The same does not apply, however, with respect to the termination of the Complainant's employment. Having carefully reviewed and considered all of the evidence in this case, I am satisfied that the Respondent has failed to establish, on the balance of probabilities, that reasonable accommodation had been made or was not possible when the Complainant's employment was terminated, for the reasons which follow.

The Respondent's position was that she was justified in terminating the

Complainant's employment on the grounds that the cost to the business of continuing to employ her constituted undue hardship. She argued that the Complainant's performance and its impact on the business had become worse over time, and that she could not jeopardize her business any longer.

While financial cost is a relevant consideration in assessing what constitutes reasonable accommodation, there must be evidence of a sufficiently substantial and quantifiable or provable financial cost to the business to establish undue hardship. The evidence in this case falls short of this.

The Respondent relied on Exhibit 10. That Exhibit is a one page document which was prepared after the Complaint was filed, based on tapes of what was punched in for "sales". No other documents or records were filed in support of that document. Exhibit 10 shows that the amount of money which the Complainant received from her employment and the amount of money which she brought into the business in 2007 from "sales" or hair services that she provided were roughly equivalent. I have already referred to problems with the accuracy of the figures and calculations in Exhibit 10, and have previously found that, calculated correctly, the figures actually disclose a small net gain due to the Complainant's "sales", as opposed to the net loss shown on that document or identified by W.T.

In addition, it is apparent that Exhibit 10 does not provide a complete picture of the Complainant's contribution to or impact on the business. It does not, for example, give any indication of the benefit which the Respondent and others may have derived from different tasks performed by the Complainant. That there was such a

benefit is demonstrated by the evidence of B.A., who testified that after the Complainant left in the afternoon, she would have to help the Respondent out more and would have to help with answering the phone, doing towels and cleaning the shop, all of which would impact her work or sales.

Exhibit 10 also gives no indication of the overall financial impact of the Complainant's employment on the business in 2007 itself, or as compared to previous years. With respect to previous years, W.T. simply stated that 2006 was a bad year also. That statement was not supported by any documentary evidence or figures.

There was the evidence of various witnesses, which I accept, that they and others had been unhappy and complained about hair services provided by the Complainant, particularly in 2007, and would not go back to her, or in some cases to the shop, while she was there. I am also satisfied, based on the evidence, that in 2007 at least, the Respondent had had to address complaints and fix problems arising out of services provided by the Complainant, at the shop's expense.

Hair Passion is a small shop, and I appreciate that problems relating to the performance or a reduction in the services of one of only three or four hairstylists could have had a significant and noticeable financial impact on the business. The Respondent would undoubtedly have been concerned that she was losing clients and valuable time and money whenever she had to deal with such problems. Again, however, there was nothing to indicate or quantify the extent to which problems with the Complainant's performance, or complaints and fixes, may have cost the Respondent in terms of lost revenue or otherwise.

Furthermore, the Respondent’s position that the cost of continuing to employ the Complainant constituted undue hardship fails to take into account the nature of the Complainant’s illness and the extent to which the Complainant’s “diminishing performance”, particularly in late 2007, had resulted from a relapse of her illness.

The nature of the illness, as described by Dr. D.H., is that it is one where individuals generally suffer from episodes or periods of mania and depression. They are treated and hospitalized, where necessary, to bring the symptoms of their illness under control or back under control. When their symptoms are stabilized and under control, most such individuals can function in the workplace.

There is evidence in this case that the Complainant had been able to function effectively in the workplace. Dr. D.H. stated that when the Complainant is well and her symptoms are under control, she is as capable as any other individual. Witnesses indicated that they had been satisfied with the Complainant’s services in the past and that her attitude had been professional. The evidence of D.B., for example, one of the Respondent’s own witnesses, was that she had seen the Complainant repeatedly as a hairstylist for six years. She said that haircuts by the Complainant were fine when she was first hired; it was in the last year that the Complainant made mistakes and D.B. was not happy. Similarly, D.B. said that the Complainant’s attitude was professional when she first started, but not in the last year or so. C.W., another of the Respondent’s witnesses, said that the Complainant was very good at what she did at the beginning, but was not very professional at the end.

In previous years, the Complainant had suffered from relapses. She had

had time off and been treated to stabilize her condition, after which she had always been able to return and continue working at the shop, with accommodations when needed.

In 2007, the Complainant was approaching or in another episode. In mid-December, she was again hospitalized to bring her symptoms back under control. By mid-January 2008, she had been in hospital for a month. She had reached the stage where she was able to go home from hospital on her first weekend pass, but her condition was still being brought under control and she was not ready to return to work.

The Respondent acknowledged that when she spoke to the Complainant in mid-January 2008, she knew that the Complainant was on leave and not well enough to be at work. In these circumstances, I am not satisfied that the Respondent could reasonably assess whether she would ultimately be able to accommodate the Complainant, in any of the ways in which she had previously accommodated her or otherwise, short of undue hardship.

The Respondent terminated the Complainant's employment without making any inquiries as to the Complainant's status or prognosis, including when or if she might be able to come back to work, and what she might or might not be able to do at that time. Having failed to make any such inquiries or obtain further information, the Respondent was not in a position to consider, and did not consider, whether or how she might reasonably accommodate the Complainant if or when the Complainant was able to return to work.

Further, there was no evidence and no explanation as to why it had

become necessary for the Respondent to terminate the Complainant's employment at that time, while the Complainant was on leave, or in other words, why it was not possible to allow her to remain on leave while her condition was being stabilized, or at least until such time as proper consideration could be given to whether or how her needs could be reasonably accommodated.

I am satisfied that the Respondent had real and legitimate concerns, based on the Complainant's past history. To a certain extent, therefore, I do not agree with the Commission's submission that the Respondent's position is based on speculative or unsubstantiated concern or after-the-fact justification. The Respondent's concerns did not, however, justify her terminating the Complainant's employment in January 2008.

The duty to accommodate is of an ongoing nature. The Respondent had a continuing obligation to take into consideration changes in the Complainant's condition and needs, and to look at what else she could do in the circumstances, if anything, to accommodate the Complainant's needs based on her illness, short of undue hardship.

In fact, in this case, it is clear that there was an appropriate and viable alternative in early 2008, namely granting the Complainant a leave of absence so that her symptoms could be brought under control and her condition stabilized.

There was no question that when the Complainant had previously suffered relapses of her illness, the Respondent had accommodated her by allowing her to take time off. There was nothing to suggest that this was not reasonably possible, or that the

Respondent was not prepared to accommodate the Complainant in the same way when the Complainant contacted her in mid-December 2007 to let her know that she was being hospitalized.

Rather, the evidence indicates that the Respondent was at least initially prepared to accommodate the Complainant by allowing her to take time off as she had in the past. The Respondent did not tell the Complainant that her employment was terminated when she first called, or in the month that followed. She testified that she spoke to the Complainant on the phone probably five or six more times between mid-December and mid-January, but did not suggest that she indicated to the Complainant during any of those phone calls that the Complainant's job was or might be in jeopardy.

It was not until mid-January, when the Complainant asked whether she had a job to come back to, that the Respondent abruptly terminated the Complainant's employment, effective December 15, 2007.

Had the situation changed in the one month period between mid-December 2007 and mid-January 2008 such as to justify the termination of the Complainant's employment on the grounds that the Respondent could no longer accommodate the Complainant's disability short of undue hardship? I am not satisfied that it had.

There was evidence that at least some of the complaints relating to the Complainant's performance were received after she had gone or was on leave. I have already concluded that the evidence in that regard was insufficient to establish undue hardship. In any event, any such complaints would clearly have related to the period of

time prior to her hospitalization.

The Complainant had been on leave for a month. There was no evidence that her being on leave had resulted in any cost to the Respondent, and nothing to suggest that accommodating or continuing to accommodate her with a leave of absence was not a viable alternative or would have resulted in hardship, much less undue hardship, to the Respondent.

I agree with the Commission that in the end, when the Respondent decided to terminate and terminated the Complainant's employment in January 2008, the process of accommodation simply failed. The substance of accommodation similarly failed. The accommodation which had been in place for the past month, the leave of absence, was withdrawn, and no alternatives to termination were considered.

In light of the foregoing, I find that the Respondent has failed to establish that she was justified in terminating the Complainant's employment in mid-January (effective December 15, 2007) on the grounds that she had reasonably accommodated or could not reasonably accommodate the special needs of the Complainant arising out of her disability. The Respondent did not consider or take into account whether or to what extent problems in 2007 had resulted from a relapse of the Complainant's illness, whether or to what extent such problems would continue at least in the foreseeable future, and whether or how the Complainant's needs could be reasonably accommodated once her condition was stabilized. The termination of the Complainant's employment while she was absent due to illness was, at the very least, premature.

In the result, I find that the Respondent discriminated against the

Complainant on the basis of her disability by terminating her employment in January 2008, contrary to section 14 of the *Code*.

Remedies

Commission counsel advised that they were seeking three remedial orders in this case. The first was an order for general damages in favour of the Complainant, pursuant to clause 43(2)(c) of the *Code*, in the amount of $2,000.00, on account of injury to self-respect and dignity.

In the Commission's submission, there was a substantial impact on the Complainant. Her employment was terminated when she was on medical leave, and only when she herself inquired after receiving a chilly response from her employer during a phone conversation. She lost her job at a very difficult time in her life, and her evidence and that of her doctor substantiate that her hospitalization and period of treatment were protracted as a result of the stress and upset caused by the termination of her employment.

Counsel for the Commission stated that the cases which they had located in this regard were not particularly apposite, if only because there was some accommodation in this case. It was again noted, however, that the accommodation process, if there was any (which the Commission denies), simply broke down. Counsel referred to the decision in *Budge* v. *Thorvaldson Care Homes Ltd.* (2002), 42 C.H.R.R. D/232 (Man. Bd. Adj.), noting that the Board of Adjudication in that case recognized that awards in Manitoba have generally been unreasonably low. In *Budge*, a sexual harassment case, the Board awarded $4,000.00 as damages for injury to the

complainant's dignity, feelings and self-respect. In awarding that amount, the Board considered, among other things, that the case involved a vulnerable employee. It was submitted that the sum of $2,000.00 would take into account not only the lower awards in Manitoba, but also the specific circumstances of this case.

Under clause 43(2)(c) of the *Code*, where an adjudicator decides that a party has contravened the *Code*, the adjudicator may order that the party "pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect."

While the Commission has argued that the testimony of both Dr. D.H. and the Complainant substantiates that her hospitalization and period of treatment were protracted as a result of the stress and upset caused by the termination of her employment, it is my view that the evidence is not nearly as compelling as the Commission suggests.

The evidence in this regard is somewhat vague. What Dr. D.H. stated was that the termination of the Complainant's employment "*likely* protracted her hospitalization" (emphasis added). He further qualified this statement by emphasizing that he was not present during the Complainant's hospitalization. The Complainant testified that her stay in hospital was "*extended* by *probably* another two weeks" (emphasis added).

When the Complainant was advised by the Respondent that her employment was terminated, she was on her first weekend pass since being hospitalized a month earlier. It is clear that she was still under hospitalization at that

time, and was to return to the Hospital at the end of the weekend. Other than the fact that she had been given a weekend pass, there was no evidence of her situation at that juncture, and in particular, of how much longer her hospitalization would have been expected to continue in the normal course of events.

The evidence discloses that the Complainant was discharged from the Hospital in February 2008, but is silent as to whether this occurred at the beginning, the middle, or the end of February. Thus, her hospitalization may only have continued for as little as two and a half weeks more, or it may have continued for as much as six and a half weeks more.

In the circumstances, I cannot conclude that the Complainant's hospitalization was in fact protracted.

I certainly accept, as Dr. D.H. stated, that the loss of her job was another stressor and that it would not have promoted the Complainant's recovery. The question remains as to what is the measure of the injury caused to the Complainant by the additional stressor.

A complicating factor in this regard is the close relationship which existed between the Complainant and the Respondent, who were repeatedly described as being very close, like sisters. The evidence shows that what was most significant for the Complainant was not the loss of her job, but the loss of her close personal relationship with the Respondent. As Dr. D.H. stated, what was most significant for the Complainant was that she felt let down and hurt by someone she considered to be more than a friend; she felt more distraught and sad because she was losing a very

significant relationship in her life.

The purpose of the *Code* is to remedy the effects of discrimination. A remedy under clause 43(2)(c) is to compensate a party for injuries to dignity, feelings or self-respect arising out of the contravention of the *Code*.

As the Commission itself has argued, however, this case is not about the personal relationship between the Complainant and the Respondent. It is about the Respondent's obligations as an employer to her employee, as it is the employment relationship which the *Code* seeks to protect.

The importance of an individual's employment to their self-esteem and sense of identity is referred to an oft-cited passage from *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, where Chief Justice Dickson (writing in dissent) stated, at page 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

In the circumstances of this case, I am satisfied that while the personal relationship was very important to the Complainant, the employment itself was also important to her, and that the termination of her employment would have had, and did have, a significant impact on her sense of identify and self-respect.

In light of the foregoing, and based on the facts of this case, I find that an award in favour of the Complainant in the amount of $2,000.00 under section 43(2)(c) of

the *Code* is just and appropriate. As a result, I order the Respondent to pay $2,000.00 for injury to the Complainant's dignity, feelings and self-respect arising out of the Respondent's contravention of the *Code*.

The second order being sought is an order, pursuant to clause 43(2)(b) of the *Code*, for an additional eight weeks' wages in lieu of notice. The Commission acknowledged that the Complainant had already received six weeks' wages in lieu of notice, as contemplated under *The Employment Standards Code*. In seeking an additional eight weeks' wages, the Commission was seeking reasonable notice at common law. The Commission submitted that the purpose of such an award would be to compensate the Complainant for the harm caused by the discrimination and the loss of her job, and thus the lost income for the period of time that the Complainant would have been employed had the discrimination not occurred. The Commission referred to the decision in *Bardal* v. *Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) ("*Bardal*") as setting out the factors for determining reasonable notice, and submitted that the equivalent of an additional eight weeks' wages, resulting in a total of fourteen weeks' wages in lieu of notice, would represent reasonable notice at common law on the facts of this case.

The position advanced by the Commission equates the remedy under clause 43(2)(b) of the *Code* with the remedy of wages in lieu of notice at common law. There are significant differences, however, between the nature and purpose of these two types of remedies.

An award on account of wages in lieu of notice is the measure of damages

in a claim for wrongful dismissal at common law, and is based on a contractual obligation to give an employee reasonable notice of an intention to terminate his or her employment. (*Bardal*, at paras. 12 to 14) The purpose of an award of damages in a wrongful dismissal case is to place the former employee in the position the employee would have been in if reasonable notice had been given, as contemplated under the contract.

A remedy under clause 43(2)(b), on the other hand, is aimed at compensating the affected party for financial losses sustained by reason of the contravention of the *Code*. The purpose of such compensation is to restore the affected party so far as is reasonably possible or appropriate to the position he or she would have been in if the discrimination had not occurred.

Having carefully reviewed all of the evidence in this case, I am unable to identify any financial losses sustained, expenses incurred or benefits lost by the Complainant by reason of the termination of her employment.

The Complainant was on medical leave when her employment was terminated. I must conclude, based on the evidence, that that leave was on an unpaid basis, there having been no indication or suggestion that the Complainant had been entitled to, or had received or expected to receive, any wages or other financial benefits while she was on medical leave.

In mid-January, the Complainant was neither ready nor able to return to work. While I have found that the termination of her employment while she was on medical leave was premature, that does not necessarily mean that it resulted in a

compensable loss. Had the Complainant been allowed to remain on leave, it would have been on the same basis as before, that is on an unpaid leave of absence. I am unable to find, therefore, that she sustained any financial loss as a result of the premature termination of that leave, at least in respect of any extended period of time during which she ought to have been allowed to remain on sick leave.

In addition, there is no evidence as to if or when the Complainant would ultimately have been able to return to work as a hairstylist or in any other capacity for the Respondent, or as to what, if any, accommodations might then have been necessary to enable her to resume working for the Respondent. There is evidence that she began working at a day care in May 2008, but there is no indication that the Complainant was able to work at all prior to that time. Nor is there any evidence of what her duties entailed at the day care, and what her capabilities and restrictions were at that time. There is also no evidence as to whether the compensation which the Complainant received from her employment at the day care was less or more that what she had been receiving or would have received from the Respondent.

Based on the evidence or lack of evidence before me, I am unable to conclude that the Complainant would ultimately have been capable of performing the essential duties of her position with the Respondent or that the Respondent could have reasonably accommodated her needs in that or any other appropriate position.

In conclusion, I am not satisfied that the Complainant sustained any financial loss as a result of the termination of her employment. I am therefore precluded from making any order under clause 43(2)(b) of the *Code*.

The third order being sought was an order that the Respondent adopt and post a suitable written policy for its employees, based in part on the Commission's policy on reasonable accommodation and acceptable to the Commission, and that the Respondent implement that policy in an expeditious manner. The Commission recognized that the Respondent operates a small hair salon and cannot necessarily be expected to have a formal and comprehensive set of employee policies. What the Commission was seeking was that there be some process, even a relatively informal one, with thought and consideration being given to the entitlement and protections provided in the *Code*.

In the circumstances, I am not satisfied that such an order is warranted or would serve any useful purpose. Under clause 43(2)(a) of the *Code*, an adjudicator may order a party to "do or refrain from doing anything in order to secure compliance with the *Code*, to rectify any circumstance caused by the contravention, or to make just amends for the contravention". An order under this heading is discretionary, and in my view, is not to be awarded automatically every time there is a breach of the *Code*.

In this case, I am satisfied that the Respondent was generally aware of and complied with her obligations under the *Code*. She recognized and made considerable efforts to accommodate the Complainant's condition over a period of several years. While I have found that the Respondent ultimately breached the *Code* by terminating the Complainant's employment while she was absent due to illness, I am satisfied that she did so in the mistaken belief that she had the right to terminate the Complainant's employment at that time, so as not to jeopardize her business, and did not intend to discriminate against her.

What the Commission has proposed is a policy based in part on its own policy on reasonable accommodation. I am satisfied, however, that the Respondent is currently well aware of the Commission's policy, and do not see any value or benefit to be gained in requiring that the Respondent repeat or incorporate all or part of that policy in a separate policy.

To the extent that the Commission would appear to be seeking to have something else included in any such policy, it has not indicated what that might be or why it would be warranted or appropriate in this case.

In the result, the Commission's request for such a remedy is denied.

The Commission also asked that the Complainant's full name not be used in the written reasons for decision, to preserve her privacy. Counsel noted that this case involves personal health information of the Complainant which is very sensitive and highly protected under *The Personal Health Information Act*, C.C.S.M. c. P33.5. The Respondent did not comment on this request.

Initials have been substituted for names of individuals, including parties and witnesses, in various decisions under the *Code* involving sensitive personal health information. (See, e.g., *A*. v. *Natural Progress Inc.* (2005), 51 C.H.R.R. D/305)

In light of the foregoing, and in the circumstances of this case, I have similarly substituted initials for the names of individuals, both parties and witnesses, in these Reasons for Decision.

Conclusion

In summary, having found the Respondent in breach of section 14 of the *Code*, I order that the Respondent pay to the Complainant the sum of $2,000.00 to compensate her for injury to dignity, feelings and self-respect.

I will retain jurisdiction for the purpose of resolving any issues which may arise from the implementation or interpretation of this decision.

Dated at the City of Winnipeg, in Manitoba, this 31st day of January, 2013.

"M. Lynne Harrison"
Adjudicator